FILE COPY

FILED
FEB 11 1960
JAMES R. BROWNING, Clerk

No. 644

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES L. SKINNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and Rule involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

DeHart v. *United States*, 237 F. 2d 227	9
Silkworth v. *United States*, 10 F. 2d 711, certiorari denied, 271 U.S. 664	7
United States v. *Lennon*, 246 F. 2d 24, certiorari denied, 355 U.S. 836	7
United States v. *One 1955 Mercury Sedan*, 242 F. 2d 429	9
Whitcombe v. *United States*, 90 F. 2d 290, certiorari denied, 302 U.S. 759	7

Statutes and Rule:

26 U.S.C. (1952 Ed., Supp. V) 5686(b), 68A Stat. 700 (now 26 U.S.C. 5686(a), in slightly modified form, 72 Stat. 1411)	2, 6
26 U.S.C.	
5174(a)	6
5180	7
5216	7
5606	7
Rule 7, Federal Rules of Criminal Procedure	2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 644

JAMES L. SKINNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 24-27; R. 335-338) is not yet reported. The opinion of the district court on the motion to suppress evidence (Pet. App. 19-23; R. 306-310) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1959 (R. 339). On January 5, 1960, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including

January 14, 1960 (Pet. App. 28), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly permitted the amendment of an information charging illegal possession of sugar intended for use in violating a designated chapter of the Internal Revenue Code, to specify particular subsections of that chapter that the intended use would violate.

2. Whether petitioner's conviction rested on evidence that had been suppressed prior to trial.

STATUTE AND RULE INVOLVED

26 U.S.C. (1952 Ed., Supp. V) 5686(b), 68A Stat. 700 (now 26 U.S.C. 5686(a), in slightly modified form, 72 Stat. 1411) provided as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder, or which has been so used, and every person so having or possessing or using such liquor or property, shall be liable to a fine not to exceed $5,000, or to imprisonment for not more than 1 year, or both.

Rule 7, Federal Rules of Criminal Procedure, provides in pertinent part as follows:

> * * * *
>
> (c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and

definite written statement of the essential facts constituting the offense charged. * * *

* * * *

(e) AMENDMENT OF INFORMATION. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

* * * *

STATEMENT

Petitioner was convicted in a non-jury trial under an information charging that on August 23, 1956 he possessed 20,000 pounds of sugar, intended for use "in violation of Sections 5174(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code (26 U.S.C. 5686(b))" (Pet. App. 35; R. 314).[1] He was sentenced to six months' imprisonment (R. 321). The court of appeals affirmed in a *per curiam* opinion (R. 322, 335-339; Pet. App. 24-27).

Pertinent evidence may be summarized as follows:[2]

---

[1] As originally filed, the information charged that petitioner possessed the sugar "with intent to use the said sugar in violation of Chapter 51, Title 26, United States Code (26 U.S.C. 5686(b))," without specifying the particular subdivisions that the intended use would violate (Pet. App. 34). The information was amended at the beginning of the trial, at the court's suggestion and over petitioner's objection (Pet. App. 35; R. 314). Following the amendment, petitioner was granted a one-day continuance that he requested (R. 19-21).

[2] This includes evidence introduced at a hearing on a pretrial motion to suppress (*infra*, pp. 5-6). It was stipulated at the trial that such evidence would be part of the record, subject to the right of either party to supplement it (R. 31, 25-28).

Between June 21 and August 23, 1956 petitioner purchased and picked up six 20,000-pound loads of sugar from the Arrow Trading Company in Brooklyn, New York (R. 32, 36, 258, 259). Mr. Krain, one of the Arrow partners, testified that petitioner said that he was storing the sugar for use after the summer "as the plant was closed and it was too hot to use the stuff" (R. 261-262). Krain asked petitioner what he meant by the word "plant," but received no reply (R. 262-263). In the first transaction on June 21, petitioner paid $1900 in cash without obtaining a receipt, and hauled the sugar away in an International truck bearing the name Walker (R. 36, 255-257, 194). In the other five hauls, the last on August 23, petitioner used a Ford truck bearing the name General Refractories. The payments were again in cash, and no receipts were obtained (R. 36, 181, 211, 193-194, 204, 259-260). Both the International truck and the Ford truck had been registered under fictitious names (R. 53-55, 72-74, 80, 95, 101-104).

On July 23, 1956 government agents observed the Ford truck [3] leaving a garage in Newark, New Jersey (R. 49, 50, 277-278). Using a search warrant, the agents raided these premises on July 25 and seized fermenting mash and an operating still which did not have a sign indicating that it was a registered distillery and for which a statutory bond had not been given (R. 51-53, 130-132, 278-279, 285). Parked near the distillery was the International

[3] Petitioner testified that he was the only one, so far as he knew, who drove his Ford truck (R. 229).

truck, loaded with 5 gallon cans of alcohol (R. 52, 146-148, 279-280).

The agents kept petitioner's Ford truck under surveillance after August 23, 1956, the date on which he picked up the last load of sugar (R. 293, 204, 263). He left it in a parking lot in Newark for several days, drove it to his sister's farm in Staten Island and on August 31 parked it in a garage in Brooklyn (R. 204-206, 209, 293). On September 7, 1956, government agents, acting without a warrant, seized the parked truck and its contents, which included 20,000 pounds of sugar, the certificate of registration for the truck, and a paid license fee receipt (Pet. App. 33; R. 294-296). Several days after September 7, petitioner obtained from the seller Krain a receipted bill for $1,800 ($1,000 less than the amount petitioner paid for the last load of sugar), pre-dated August 23, 1956 (R. 264-265, 272).

Petitioner filed a pre-trial motion to suppress the seized evidence (Pet. App. 19). After hearing (R. 180-305), the district court granted the motion, on the ground that the search and seizure without a warrant were unlawful (Pet. App. 19-23). The court entered an order prohibiting the United States "from using any evidence resulting from the illegal search and seizure against the defendant" (Pet. App. 34).

At the hearing on the motion to suppress, petitioner testified that he was in the scaffolding and contracting business in Newark (R. 183-185); and

that he purchased the sugar in order to sell it to one Joe Abrams for a profit of $50 on each sale (R. 195-196). Petitioner testified that he had seen Abrams about 50 times during the 10 years he had known him, but that he did not know Abrams' occupation, home address, office address, or telephone number (R. 199).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 10-13), the district court properly permitted the information to be amended to specify the particular subsections of Chapter 51 of the Internal Revenue Code that the intended use of the sugar would violate. Such amendment was authorized by Rule 7(e) of the Federal Rules of Criminal Procedure, which sanctions the amendment of an information "at any time" before verdict or finding "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

Both the original and the amended information charged only a single offense, namely, illegal possession of sugar in violation of 26 U.S.C. 5686(b). That section makes it illegal to possess any property "intended for use in violating the provisions of this chapter," i.e., Chapter 51 of Title 26. The original information charged that the sugar was intended for use "in violation of Chapter 51." The amendment merely specified four subsections of Chapter 51 that such use would contravene.[4] But by so specifying it

[4] These sections cover the requirement for registration of stills or distilling apparatus (5171(a)); requirement of a

did not, as petitioner argues (Pet. 11), charge "four specific and distinct offenses." For, as the court of appeals pointed out (Pet. App. 25-26), petitioner "was not charged with having violated any of the [sub]sections * * * but rather was charged with the possession of a single specified amount of sugar on a single specified date for an intended use which would violate several sections of Chapter 51 of the Internal Revenue Code." The specification of the four subsections did not convert the information into one charging four separate crimes. Cf. *United States* v. *Lennon*, 246 F. 2d 24, 27 (C.A. 2), certiorari denied, 355 U.S. 836; *Silkworth* v. *United States*, 10 F. 2d 711, 714 (C.A. 2), certiorari denied, 271 U.S. 664; *Whitcombe* v. *United States*, 90 F. 2d 290, 293 (C.A. 3), certiorari denied, 302 U.S. 759.

Petitioner has not shown that any of his substantial rights were prejudiced by the amendment. Petitioner was given the one-day continuance which he requested after the amendment (R. 19-21).

2. Nor is there any basis for petitioner's contention (Pet. 13-18) that his conviction rested upon evidence that had been suppressed. The pre-trial order suppressed only the "use of evidence resulting from the unlawful search and seizure" of September 7, 1956 in which petitioner's Ford truck, the 20,000 pounds of sugar purchased in the last load on August 23,

---

sign for registered distilleries (5180); penalty for carrying on the business of a distiller without giving bond (5606); and prohibition of the fermentation of mash and other ingredients on any premises other than an authorized distillery (5216) (Pet. App. 29-32).

1956, the certificate of registration for the truck, and a paid license fee receipt were found (Pet. App. 34; R. 294-296). None of that evidence was introduced. Although the trial court relied on the testimony given at the pre-trial hearing to suppress, it did so pursuant to a stipulation, entered into at the beginning of the trial, that such testimony should be a part of the trial record (R. 31, 25-28, 121-123, 149). As the court below stated, "The fact that suppressed evidence, if admitted, would tend to prove certain matters does not prevent the introduction of evidence, untainted by the illegal search and seizure, that tends to prove the same matters" (Pet. App. 27).

The court below correctly held (Pet. App. 26-27) that, apart from the evidence ordered suppressed, the government adequately proved the two elements of the offense: "(1) possession of property, (2) intention that the property be used in violation of any section of Chapter 51." Petitioner's possession of the sugar on August 23, 1956 was shown by the testimony of the seller Krain. The intended illegal use of the sugar was amply established. The International and Ford trucks, both registered in fictitious names and used in hauling purchased sugar, were traced to an unregistered distillery. Petitioner obviously had no need for sugar in his scaffolding and contracting business and offered an unconvincing explanation of its intended use. Moreover, when petitioner learned of the government investigation, he resorted to the deceptive tactic of obtaining from the seller a pre-dated bill for the August 23rd load of sugar for an amount $1,000 less than he had paid

for it (see the Statement, *supra*). In its totality, the evidence clearly justified the finding that petitioner was guilty as charged. Cf. *DeHart* v. *United States*, 237 F. 2d 227 (C.A. 4); *United States* v. *One 1955 Mercury Sedan*, 242 F. 2d 429, 431 (C.A. 4).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

FEBRUARY 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 539251 4028